No. 17-1575

In the Supreme Court of the United States

ALWASI YONG,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court deny review where the state court declined to suppress evidence on the narrow, fact-specific basis that an officer at the scene with probable cause to arrest petitioner would "inevitably and imminently" have done so had his fellow officer (who did not have probable cause) not arrested petitioner just moments before?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER AUTHORITIES

INTRODUCTION

This case is about whether an arrest is lawful when one officer at the scene has probable cause to make the arrest and would "inevitably and imminently" have done so had a fellow officer who did not have probable cause not made the arrest moments before. Petitioner acknowledges that Officer Joseph McCook of the Philadelphia Police Department had probable cause to arrest him. McCook, who had previously observed him engage in a drug transaction, executed a search warrant for a house with a small team of officers and found petitioner on the premises. Just moments before McCook had the chance to arrest him, Officer Gerald Gibson, another officer on the team, did so, patted him down, and found a gun. Under these narrow circumstances, the Pennsylvania Supreme Court held that the arrest was lawful, reasoning that McCook would "inevitably and immediately" have ordered petitioner's arrest had Gibson not acted first.

In urging this Court's review, petitioner properly limits his question presented to situations in which an officer on the scene—other than the one who acted—had the requisite probable cause or reasonable suspicion to act. But petitioner then leaves this narrow question behind. Instead, he asserts the existence of "an entrenched circuit split," citing inapposite cases where *no* individual officer had probable cause or reasonable suspicion. In those cases, unlike here, the courts were required to consider whether the knowledge of multiple officers could be aggregated to reach the necessary threshold. Only half of the cases petitioner cites (8 of 16) actually involve the question presented, where one officer on the scene

unquestionably had probable cause or reasonable suspicion, but another officer seized the defendant. In five of those cases, the outcomes are the same as that reached here. The other three are clearly distinguishable. There is no conflict, and no reason to grant the petition.

Moreover, this case is particularly unworthy of *certiorari* because, regardless of the merits of the question presented, petitioner would not be entitled to relief and so there is no reason for this Court to expend its resources on it. The inevitable discovery exception to the exclusionary rule applies for the same reasons the Pennsylvania Supreme Court held that the arrest here was valid. McCook, who had seen petitioner participating in a drug deal days earlier, entered the room just as Gibson was arresting petitioner. Under these facts, McCook inevitably would have ordered the arrest or searched petitioner himself and discovered his gun regardless of Gibson's actions. Thus, this Court's ruling would not make a difference in the outcome of this or any analogous case. The petition should be denied.

STATEMENT OF THE CASE

On September 21, 2011, the Philadelphia Police Department began a three-day narcotics surveillance operation using confidential informants. On the first day, Officer Joseph McCook saw an informant hand money to petitioner Alwasi Yong. McCook then saw petitioner give the money to another man, who went into a house and returned with marijuana for the informant. On the third day of the investigation, McCook again saw petitioner in front of the house. App. 2a, 3a.

A team of police officers, including McCook and Officer Gerald Gibson, obtained a search warrant for the house and executed it on September 23, 2011. Petitioner does not dispute that McCook had probable cause to arrest him. Petitioner was in the house when the officers arrived. Gibson entered the house just moments before McCook did.

> [BY DEFENSE COUNSEL]: Okay. How quickly after you entered [the house] did Officer Gibson seize Mr. Yong?
>
> [BY OFFICER McCOOK]: Just as I was going inside.

App. 73a (Notes of Testimony, Suppression Hearing). Gibson arrested petitioner, conducted a pat down, and found a loaded revolver in his waistband. App. 4a, 8a.

The Commonwealth charged petitioner with violations of the Uniform Firearms Act, possession with the intent to deliver a controlled substance, and conspiracy. Petitioner filed a motion to suppress the gun, which the trial court denied. App. 4a, 5a, 7a.

The record is muddled with respect to McCook's communication with Gibson prior to the arrest. At the suppression hearing, McCook testified that before the team executed the warrant, he "met up with the other officers to get ready to execute [and] to brief them on the execution of the search warrant." App. 72a. After the trial court denied petitioner's motion to suppress, McCook again took the stand at trial and testified that, prior to entry, he *instructed* Gibson and the other officers to pat down petitioner and others in the house. App. 54a.

Petitioner was convicted and sentenced to a term of imprisonment. He appealed to the Pennsylvania Superior Court (an intermediate appellate court). That court reversed his conviction based on his suppression claim. In doing so, the court declined to impute McCook's probable cause to Gibson on the ground that the evidence at the suppression hearing was not sufficient to show that McCook had communicated with Gibson prior to the arrest. App. 54a.

The Pennsylvania Supreme Court, in turn, reversed the Superior Court. In doing so, it rejected the Commonwealth's argument that a suppression court can aggregate information from many different officers after the fact to determine probable cause or reasonable suspicion. App. 17a-18a. The Pennsylvania Supreme Court expressly "decline[d] to adopt a sweeping rule authorizing" the Commonwealth's approach. App. 27a. Instead, the court limited its holding to the narrow fact pattern presented and held that "where, as here, the arresting officer does not have the requisite knowledge and was not directed to so act, we hold the seizure is still constitutional where the

investigating officer with probable cause or reasonable suspicion was working with the officer and would have inevitably and imminently ordered that the seizure be effectuated." App. 30a.[1] This petition for a writ of *certiorari* followed.

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[1] The Pennsylvania Superior Court acknowledged that the trial court had inferred that, in fact, "Officer McCook instructed Officer Gibson to arrest [petitioner]." App. 54a. It further noted that the "testimony presented at [petitioner's] *trial* suggests that this is what occurred." App. 54a (emphasis added). But the Superior Court held that its scope of review was limited to "only the suppression hearing record, and excludes any evidence elicited at trial." App. 42a, citing *In re L.J.*, 79 A.3d 1073, 1085 (Pa. 2013). The Pennsylvania Supreme Court, in turn, noted that the question of whether the scope of review it adopted in *L.J.* applies retroactively to cases such as this one (where the suppression hearing took place before *L.J.* was decided) remains unresolved. App. 9a. But as the Pennsylvania Supreme Court disposed of the case on the narrow ground discussed *infra*, it did not need to delve into the question of which portions of the record should be considered as a matter of state or federal law or what inferences may be properly drawn with respect to the content of the communications between the officers at the scene.

REASONS FOR DENYING THE PETITION

I. The Pennsylvania Supreme Court's Decision Is Narrow and Fact-Specific.

The Pennsylvania Supreme Court emphasized the narrowness of its holding by rejecting the "sweeping rule" proposed by the Commonwealth, which would have allowed courts to aggregate information from multiple officers without direction or communication. App. 27a. The court then highlighted the narrow facts under which this case arose: "[T]he investigating officer with probable cause or reasonable suspicion was working with the [acting] officer and would have inevitably and imminently ordered that seizure be effectuated." App. 30a.

Of the 16 cases petitioner cites to support his argument that there is a conflict, only eight involve cases like this where one officer has probable cause or reasonable suspicion. Of those cases, only one involves this situation—where officers are working together and where the one who had probable cause would "inevitably and imminently" have ordered the search or seizure. *See United States v. Ragsdale*, 470 F.2d 24 (5th Cir. 1972). In *Ragsdale*, two officers stopped a speeding car. *Id.* at 25. During the stop, one officer walked the defendant to the patrol car, noticed the defendant's bloodshot eyes, and saw a gun under the driver's seat. *Id.* at 25-26. Not knowing these facts, the other officer searched the defendant's car and found the gun, two other guns, and a large amount of money. *Id.* at 26. The Fifth Circuit reasoned that it would be "hyper technical to insist on bifurcating the knowledge of the officers" because the first officer, who had probable cause, would certainly have searched the

defendant's car had his partner not "moved too swiftly." *Id.* at 30.

Fourth Amendment scholar Wayne R. LaFave described the facts in *Ragsdale* (which parallel those here) as "rather unusual" and concluded that *Ragsdale's* "result is not open to serious question." 2 Wayne R. LaFave, Search And Seizure: A Treatise on the Fourth Amendment § 3.5(c) (5th ed. 2017). Nor is the result here. Far from raising a question worthy of *certiorari*, the Pennsylvania Supreme Court's decision is virtually *sui generis* (with only one similar case from 46 years ago) and not open to serious question.

Petitioner's fear that the decision will lead to "arbitrary invasions by government officials" is misplaced. Pet. 3. The Pennsylvania Supreme Court did not condone the "game of chance" petitioner warns against. Pet. 3. Instead, the court expressly limited its holding to the facts before it: (1) one officer unquestionably has probable cause to conduct a search or seizure; (2) that officer is working in close proximity with the officer who acted; and (3) had the other officer not acted too swiftly, the officer with probable cause inevitably would have acted. This "rather unusual" scenario is markedly different from the many cases petitioner cites where no single officer has probable cause, but where the court imputes probable cause to the acting officer by aggregating the knowledge of every officer after the fact. The narrow holding of this case does not implicate petitioner's concerns.

II. The Pennsylvania Supreme Court's Decision Does Not Conflict With Decisions of Other Federal or State Courts.

Precisely because the Pennsylvania Supreme Court's decision is narrow and fact-specific, it does not conflict with decisions of other federal or state courts.

Petitioner attempts to manufacture a conflict by relying on a different class of cases—those that turn on the question whether the court should aggregate information from many officers to find probable cause or reasonable suspicion in situations where no single officer had the requisite probable cause or reasonable suspicion. *See*, *e.g.*, *United States v. Ellis*, 499 F.3d 686, 690 (7th Cir. 2007) (declining to aggregate information known to officers at different entrances of a house to find probable cause); *United States v. Kye Soo Lee*, 962 F.2d 430, 435 (5th Cir. 1992) (reasoning that while neither officer had enough information to justify arrest, their knowledge aggregated to form probable cause); *State v. Bell*, 948 S.W.2d 557, 560-61 (Ark. 1997) (aggregating the "essential facts that were available to law enforcement" to hold that the acting officer had probable cause); *Haywood v. United States*, 584 A.2d 552, 557 (D.C. 1990) (declining to aggregate information known to one officer to supplement the personal knowledge of the acting officer to find reasonable suspicion); *State v. Peterson*, 696 P.2d 387, 393 (Kan. 1985) (allowing aggregation of evidence "gathered by the various law enforcement

officers" to find probable cause to arrest).[2] That is not the situation here. In fact, as noted, the Pennsylvania Supreme Court expressly declined to adopt such an expansive rule. App. 27a.[3]

Nor do the other eight cases petitioner cites—that (like this case) involve one officer who has probable cause or reasonable suspicion yet another one acts—support granting the petition. This is because the result is the same in five of them. *See*, *e.g.*, *United States v. Ramirez*, 473 F.3d 1026, 1033 (9th Cir. 2007) (allowing imputation to officer who searched a car where officer with probable cause ordered the traffic stop); *United States v. Gillette*, 245 F.3d 1032, 1034 (8th Cir. 2001) (allowing imputation to officer who searched a car parked in a driveway where officer with probable cause was inside house); *United States v. Ragsdale*, 470 F.2d 24, 30 (5th Cir. 1972) (discussed *supra*); *State v. Weber*, 139 So. 3d 519, 522-23 (La. 2014) (allowing imputation to officer who conducted a

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[2] *Cf. United States v. Shareef*, 100 F.3d 1491, 1504-05 (10th Cir. 1996) (declining to aggregate information dispersed among multiple officers, but finding that the acting officer himself had reasonable suspicion based on his own personal knowledge).

[3] Petitioner also cites two intermediate state court decisions as part of his alleged conflict. These cases do not support granting of the petition. *See* Sup. Ct. R. 10. In any event, one of the cases reached the same result as the Pennsylvania Supreme Court. *See State v. Talbot*, 246 P.3d 112 (Utah App. Ct. 2010) (allowing imputation when a sheriff with probable cause directed his deputy to act). The other case is distinguishable. *See People v. Mitchell*, 585 N.Y.S.2d 759 (N.Y. App. Div. 1992) (declining to impute information known to one officer to the arresting officer who had left the scene to chase down the defendant).

blood draw even though officer with probable cause to order it did not communicate because "it made no practical difference which member of the team investigating the accident actually gave the authority for the blood draw"); *State v. Iven*, 335 P.3d 264, 269-70 (Okla. 2014) (allowing imputation to the arresting officer where the officer who had probable cause directed the arrest).

The other three cases petitioner cites that involve a single officer with probable cause or reasonable suspicion in which the court did not allow imputation do not conflict with the Pennsylvania Supreme Court's decision. In *United States v. Massenburg*, 654 F.3d 480 (4th Cir. 2011), the court did not allow imputation of one officer's knowledge to an officer who conducted a pat down. *Id.* at 495. The court did not discuss whether either officer on the scene independently had reasonable suspicion and, unlike in this case, did not make a finding that a proper search or seizure inevitably would have occurred. In fact, the Pennsylvania Supreme Court cited *Massenburg* favorably and relied on its reasoning to reject "the aggregation rule." *Id.* at 495.

State v. Cooley, 457 A.2d 352 (Del. 1983), and *Montes-Valles v. State*, 216 So. 3d 475 (Fla. 2017), also involved situations where there was no officer with probable cause or reasonable suspicion who would "inevitably and immediately" have ordered a seizure. Indeed, in those cases, the acting officer was not even in close proximity to the officer with probable cause. In *Cooley*, the officer with probable cause was at the scene of the accident, but the arresting officer and the officer who directed the arrest were both at the police station.

457 A.2d. at 353, 355-56. Under these facts, the Supreme Court of Delaware declined to impute the knowledge of the officer with probable cause to the other officers. *Id.* at 355-56. Similarly, in *Montes-Valles*, the officer with probable cause left the acting officer in charge of the accident scene, but the facts did not reveal where the officer with probable cause went, why he delegated control of the scene, or whether he stayed on the scene after delegating control. 216 So. 3d at 479. Under these circumstances, the Supreme Court of Florida declined to impute knowledge from the officer who had probable cause to the acting officer. *Id.* at 479.

In short, the Pennsylvania decision does not conflict with any case. Petitioner's attempt to manufacture a conflict fails.

III. The Court Should Not Expend Its Resources on this Case Because, Even If Petitioner's View of the Law Is Correct, The Evidence at Issue Would Not Be Suppressed.

This Court's review is ill-advised for an additional reason. Even assuming, as petitioner claims, that Gibson unlawfully arrested and searched him, petitioner would not be entitled to relief as a matter of settled Fourth Amendment law.

While the Pennsylvania Supreme Court addressed whether police violated the Fourth Amendment by performing an unreasonable search and seizure, its analysis overlaps with the question of whether the exclusionary rule applies. Even if the arrest had been

illegal, suppression would be unavailable as a matter of federal constitutional law.

In *Nix v. Williams*, 467 U.S. 431 (1984), this Court held that a court will not suppress evidence obtained by an illegal search if "the evidence in question would inevitably have been discovered without reference to the police error or misconduct." *Id.* at 448. It follows that, because the state court determined that McCook inevitably would have ordered the arrest or searched petitioner himself and discovered precisely the same evidence, that evidence would be deemed properly admitted at trial regardless of the legality of Gibson's arrest itself.

In this case, and any case with analogous facts, the finding that the search or seizure was inevitable and imminent triggers the inevitable discovery doctrine. Indeed, in *Ragsdale*, the Fifth Circuit held that its decision was correct for the "alternative and equally compelling reason" that the evidence would "imminently and lawfully" have been discovered regardless of the contested search. 470 F.2d at 30. Thus, even if this Court were to grant review, a decision on the legality of the search would have no practical effect. For this reason, too, the petition should be denied.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court deny the petition for a writ of *certiorari*.

Respectfully submitted,

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